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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20120194
Ward County Civil No. 31-10-C-00162

Wenco, a North Dakota Limited Partnership,	)
Appellant,	)
vs.	)
EOG Resources, Inc., QEP Energy Company, John Doe Defendants 1-10, claiming any estate or interest in, or lien or encumbrance upon, the property described in numbered paragraph 29 of the complaint,	)
Appellee.	)

APPEAL OF THE ORDER DATED FEBRUARY 2, 2012
AND JUDGMENT DATED FEBRUARY 8, 2012
IN MOUNTRAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

THE HONORABLE TODD L. CRESAP, PRESIDING

APPELLANT WENCO'S REPLY BRIEF

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[¶1] Because the district court incorrectly applied the *Duhig* rule to the facts of this case, Wenco seeks reversal of the district court's decision granting summary judgment to QEP and EOG. In the alternative, if the Court concludes the district court properly applied *Duhig* and this Court's holding in *Acoma* to the facts of this case, this Court should overrule *Acoma* as an improvident and illogical expansion of the *Duhig* rule. QEP defends Acoma under the doctrine of *stare decisis, QEP brief ¶ 33,* but acknowledges the doctrine is not "sacrosanct." *Id*. Wenco concurs. *Acoma* stands alone among the eight prominent *Duhig* cases in North Dakota common law, and, as discussed below, there are three reasons it should be revisited.

[¶2] If the Court concludes *Acoma* is properly applied to the facts of this case and *Acoma* should remain good law, Wenco seeks a reversal of the district court's decision that Wenco lacked standing to assert QEP waived its right with respect to the royalty conveyance to Bank, and requests remand for a factual determination of QEP's waiver. The question of waiver is ordinarily a question of fact. *Gale v. North Dakota Board of Podiatric Medicine*, 2001 ND 141, ¶ 14, 632 N.W.2d 424. As this Court has observed, "[a] person may waive contractual rights and privileges to which that person is legally entitled." *Sanders v. Gravel Products, Inc.*, 2008 ND 161, ¶ 10, 755 N.W.2d 826, 831 (citing *Lawrence v. Delkamp*, 2006 ND 257, ¶ 8, 725 N.W.2d 211, 213).

[¶3] Neither EOG nor QEP argued to the district court that Wenco lacked standing to assert QEP's waiver of its rights. Neither EOG nor QEP now defends the district court's lack of standing rationale on appeal. Instead, EOG and QEP argue the known facts relative to waiver support only the conclusion that QEP did not waive its rights, such that

the district court's award of summary judgment on the waiver issue was nevertheless appropriate. *EOG brief at ¶ 55*; *QEP brief at ¶ 38*

I. THE DUHIG RULE IS AN EQUITABLE SHIELD, NOT A SWORD.

[¶4] The *Duhig* rationale is simply a rule of construction. It does not confer title or an estate when no estate or title is affirmatively granted in a conveying instrument. *Duhig* relies on equity to prevent a grantor from using the reservation clause of his deed to deny the grantee all the estate that the grantor purported to convey in the granting clause. The grantor cannot grant and reserve the same mineral interest. *Gawryluk*, ¶ 13.

[¶5] As Wenco argued to the district court and reasserts on appeal, there is no reason to invoke *Duhig*—to impose an equitable rule of construction that *Duhig* requires—when the grantor, in this case the Dockters, held a sufficient mineral estate to satisfy entirely the grant to their grantee (Grinnan), and made no conflicting reservation for themselves as grantors. The underlying facts that require the *Duhig* equitable rule of construction are absent. There is no factual dispute that, at the time of the Dockters' execution and delivery of a 50% undivided mineral deed to Grinnan, the Dockters in fact owned at least a 50% undivided mineral interest. (App. 29) There is also no dispute that the mineral deed to Grinnan did not contain a conflicting reservation of interest back to the Dockters.

[¶6] According to EOG on appeal, after EOG was contacted by its working interest partner QEP about a potential discrepancy, Ms. Linford was contacted and subsequently "discovered" an "error." *EOG brief at* ¶ 24. Citing pages 24-28, and 31 of its separately filed appendix, EOG argues "Ms. Linford determined that pursuant to the *Duhig* doctrine

as applied by the North Dakota Supreme Court in *Acoma*, Wenco's interest was burdened by the entire severed royalty interest held by the Bank and that QEP's interest was unencumbered by said interest. (*Id.*)" *EOG brief at* ¶ 24.

[¶7] Ms. Linford made no mention of *Duhig* or *Acoma* that is present in the record on appeal. What she actually concluded, after being asked to reexamine her two previously issued opinions, contained in an email message to an EOG representative (EOG App. 18), is that the failure of the Dockters to Grinnan mineral deed to explicitly acknowledge the prior Bank royalty conveyance had the legal effect of not burdening Grinnan and only burdening Wenco's interest. She stated: "This [Dockters to Grinnan mineral] deed made no mention of the previously severed landowner's royalty then held by [Bank] and, consequently, Mr. Grinnan took this mineral interest free of the burden of said royalty interest. As a result, the remaining ½ interest held by Mr. Dockter [Wenco's predecessor] became burdened by the full severed royalty interest." (EOG APP. 18)

[¶8] The failure of a subsequent recorded conveyance to recite prior royalty burdens is not the specific supporting rationale of *Duhig* or this Court's ruling in *Acoma*. As this Court stated in *Acoma*, "Duhig resolves a conflict between grant and reservation clauses under principles of estoppel by warranty, . . ." *Acoma* at 481. Wenco understands *Acoma* purported to extend the application of *Duhig* to facts that are similar to the present case in which the disputed conveyance did <u>not</u> contain a conflicting reservation.

[¶9] As explained in its principal brief, however, the concurring opinion in *Acoma* described the limited application of *Acoma's* holding. The concurring *Acoma* opinion explained that the rule announced in *Acoma* was a new rule of equity in the realm of

mineral conveyances that concluded "as a matter of equity **heirs who take through the original grantor should bear the burden** of the royalty interest in contrast to purchasers for value from the original grantor **of a specified number of mineral acres**." (**emphasis added**). *Id.*

[¶10] All of the three factors the concurring opinion in *Acoma* suggested might change the result in *Acoma* are present in the instant appeal. First, Wenco was a purchaser for value, not an heir of the Dockters. Second, the Dockters deed to Grinnan was not a specified number of mineral acres; it was a grant of a 50% mineral interest. Third, after the Dockters conveyed to Wenco, Dockters had conveyed all their mineral interest.

[¶11] EOG and QEP reminded the district court and this Court that the *Acoma* concurring opinion does not have the force of law. EOG, ¶ 44; QEP brief at ¶ 23. Wenco has never expressed the view that a concurring opinion is law. The *Acoma* concurring opinion described the limits of the *Acoma* opinion and what hypothetical facts might change the result. The Dockters did not "grant and reserve the same mineral interest" *Gawryluk*, ¶ 13, the necessary predicate for invoking *Duhig's* equitable rule of construction.

II. IF THE CONCURRING OPINION OF *ACOMA* DOES NOT LIMIT ITS APPLICATION AS ARGUED BY WENCO, *ACOMA* SHOULD BE DISCARDED.

[¶12] The first reason this Court should review the wisdom of *Acoma* is that it purported to follow *Duhig* but seemed not to understand that *Duhig* involved a conflict between two statements in the same deed. The deed in *Acoma* contained no explicit reservation of interest by the grantor. *Acoma* at 479. In concluding it would follow *Duhig*, *Acoma*

observed that "[l]ike *Duhig*, in cases where a grantor conveys some mineral interests while keeping some mineral interests in the same tract of land without an explicit reservation, the focus is on whether or not the grantor has enough mineral interests in tract of land to satisfy the conveyance." *Acoma* at 482 [Underlining added]. There was an explicit reservation in *Duhig* and the conflict between the explicit reservation and the explicit grant in the same instrument is what gives rise to the *Duhig* rule. *Duhig at* 880. The patent conflict in the same conveying instrument—a grant of mineral acres with a reservation of the same mineral acres—is the reason to have the rule of construction *Duhig* adopts.

[¶13] In other North Dakota cases applying *Duhig*, the problem of the grantor overconveying, which includes granting and conveying the same mineral estate, has formed the basis for invoking the equitable rule of *Duhig*. The effect of the *Duhig* doctrine is that a grantor cannot grant and reserve the same mineral interest. *Gawryluk*, ¶ 180 (overconveyance does not create ambiguity permitting admission of parol evidence; overconveyance resolved in favor of grantee under *Duhig*); *Kadrmas v. Sauvageau*, 188 N.W.2d 753, 754 (N.D. 1971) (conflict in reservation clause must yield to the grant clause under *Duhig*); *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D. 1984) (factually identical to *Duhig* in that grantor owned half minerals and proceeded to grant and reserve the same one half mineral estate; conflict resolved in favor of grantee); *Miller v. Kloeckner*, 1999 ND 190, ¶ 18, 600 N.W.2d 881 (a grantor that owns half mineral interest and purports to grant one half interest will pass one half interest even with explicit limitation on warranty of title; warranty of title not required to pass title); *Mau v.*

Schwan, 460 N.W. 2d 131, 134 (N.D. 1990) (claims of fraud, mutual mistake, and undue influence not available to challenge conflict between grant and purported reservation of one half mineral estate); *Melchior v. Lystad*, 2010 ND 140, ¶ 9 (reformation based on mutual mistake not available for purported reservation of one half mineral estate when grantor owned only half mineral estate and conveyed one half of mineral estate).

[¶14] *Acoma* thus stands out as an aberration in North Dakota *Duhig* cases, applying a rule of construction while conceding the underlying fact for applying the rule—a conflict between the grant and reservation—is missing. There is no reason to resort to rules of construction, whether the rule is statutory based or common law based, to resolve an interpretation of a deed that contains no ambiguity.

[¶15] *Acoma* has another shortcoming. It acknowledges the fundament difference between a royalty interest and a mineral interest, but proceeds to treat them as the same. "Mineral and royalty interests are separate property interests with different characteristics." *Acoma* at 882.

[¶16] Notwithstanding this fundamental difference between the full rights of a mineral interest and the limited right of a royalty interest, *Acoma* concludes that the grantee of mineral acres takes the grant free and clear of pre-existing royalty interest of record if the grantor owned enough mineral interest to satisfy the grant.

[¶17] As the concurring *Acoma* opinion seemed to intimate, that result hardly makes sense between two good faith purchasers for value such as QEP and Wenco. The Bank royalty conveyance burdened the entire tract before Wenco or QEP acquired their respective one half interest in the mineral estate. But because QEP's predecessor in

interest, Grinnan, took title to and recorded his one half interest first, under *Acoma* he avoids the royalty interest that was of record when he acquired the one half interest. While North Dakota recognizes a first in time priority for two conveyances that convey the same "real estate," § 47-19-41, N.D.C.C., such a rule should not apply to two good faith purchasers for value who each purchase an undivided one half interest in the same real estate.

III. THERE IS ABUNDANT EVIDENCE IN THE RECORD THAT MAY LEAD A FINDER OF FACT TO CONCLUDE QEP WAIVED ITS RIGHT TO CLAIM THE BANK ROYALTY CONVEYANCE BURDENED ONLY THE WENCO ESTATE.

[¶18] Both EOG and QEP take the position that there was insufficient evidence to support Wenco's waiver claim, such that the granting of summary judgment on the waiver issue was nevertheless appropriate, albeit for reasons not related to the district court's standing analysis. Wenco disagrees.

[¶19] The record is replete with QEP conduct that may fairly be regarded as a waiver. Before the Wenco Well was drilled, QEP and EOG entered into negotiations for QEP to share in the cost of drilling the well. Their negotiations led to an executed agreement between them. (App. 328-387) Wenco recounted to the district court and in its initial brief to this Court how QEP acquired the mineral estate. EOG desired QEP's participation in the Wenco Well, indicating that EOG's "economics only work if [QEP] participates or leases its minerals." (App. 452) QEP was a willing participant, but insisted on seeing the title opinions prepared by Ms. Linford. (App. 454-56)

[¶20] Following email exchanges, QEP formalized its commitment to participate in the

Wenco Well with an April 4, 2007 letter to EOG outlining the terms of its participation. QEP's participation was "subject to review and approval" of EOG's title opinion. (App. 456). There is no factual dispute that QEP received the Linford December 11, 2006 opinion that concluded QEP's mineral estate was burdened by the Bank royalty conveyance. (App 458) This is compelling evidence of a contracting party's waiver of a known right. QEP is invited to contract for the drilling of the Wenco Well. As a potential contracting party, QEP insists on verifying the status of the mineral estate—and "accepting" the status of the mineral estate—as a condition precedent to its participation. QEP reviews the title opinion declaring it is burdened along with Wenco by the Bank royalty conveyance and elects to participate in the well without correcting or disputing the Linford opinions.

[¶21] Wenco submits a reasonable fact finder could conclude from QEP's conduct and written correspondence that it relinquished its claim that it was not burdened by the Bank royalty conveyance. The district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment. *Hale v. Ward County*, 2012 ND 144, ¶ 19, ___ N.W.2d____, [citations omitted]. Clearly, a reasonable finder of fact could infer waiver from QEP's conduct. *Federal Land Bank of St. Paul v. State*, 272 N.W.2d 580 (N.D. 1979). Approving and accepting a title opinion that specifically quantifies one's mineral interest is conduct that might reasonably be construed as a waiver of claims that deviate from that opinion.

[¶22] Not only did QEP demand, receive and approve Linford's opinion, QEP

bargained for and received other rights to review and approve title. Under the operating agreement, QEP had the right to review and approve title before any well was drilled: "No well shall be drilled . . . until . . . title has been accepted by all of the parties who are to participate in the drilling of the well." (App. 332) Wenco offered additional waiver evidence related to QEP's failure to dispute the validity of the Bank royalty conveyance when it acquire the Disputed Property.

[¶23] The district court impermissibly weighed the facts on the waiver issue, reasoning that a waiver could not have been effected before QEP received a division order and several payments under the division order. A fact finder might construe QEP's waiver to have occurred during the contract formation with EOG. Once waiver occurs, it cannot be extracted, recalled, or expunged. *Steckler at 79.*

CONCLUSION

[¶24] For these reasons, the district court's judgment should be reversed.

DATED this 7th day of August, 2012.

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CERTIFICATE OF COMPLIANCE ON WORD COUNT

[¶25] I hereby certify that this brief complies with NDAPP 32(a)(7)(A); the word count is approximately 2,490 words.

Dated this 7th ay of August, 2012.

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CERTIFICATE OF WORD PROCESSING PROGRAM

[¶ 26] The word-processing program is Microsoft Office Word 2003.

Dated this 7th day of August, 2012.

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CERTIFICATE OF SERVICE

[¶ 27] I hereby certify that the above and foregoing ***Appellant Wenco's Reply Brief*** was, on the 7th day of August, 2012, electronically filed with the Clerk of the North Dakota Supreme Court, and that a true and correct copy of the same was also served upon the following by Electronic Mail:

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